

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

STEWART SMITH, Individually and : CIVIL ACTION
on behalf of all others similarly situated, :
Plaintiff :
 :
 : Case No.: 2:20-CV-3583-BMS
v. :
 :
 :
 :
 :
DIRECT BUILDING SUPPLIES, LLC and :
DOES 1 through 10, inclusive, and each :
of them, : **DEMAND FOR JURY TRIAL**
Defendants :

DEFENDANT, DIRECT BUILDING SUPPLIES, LLC’S
MOTION TO DISMISS AND STRIKE CLASS ALLEGATIONS OF PLAINTIFF’S
SECOND AMENDED COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 12(f), Defendant, Direct Building Supplies, LLC, by its attorneys Tucker Arensberg, P.C., hereby moves to dismiss and strike class allegations of Plaintiff's Second Amended Complaint and, and in support thereof, states:

1. Plaintiff, Stewart Smith (“Plaintiff”), initiated this action by filing a Complaint before this Honorable Court on July 22, 2020, alleging negligent violations of the Telephone Consumer Protection Act, (“TCPA”), and willful violations of the TCPA on behalf of himself and two putative classes of allegedly similarly situated individuals. (Doc. 1).

2. On September 17, 2020, Defendant, Direct Building Supplies (“Defendant”), filed an Uncontested Motion for Extension of Time to Respond to the Complaint. (Doc. 3).

3. On October 30, 2020, Defendant moved to dismiss Plaintiff's Complaint. (Doc. 6).

4. In response, on November 13, 2020, Plaintiff filed a Second Amended Complaint. (Doc. 8).

5. On or about November 25, 2020, Defendant moved to dismiss Plaintiff's First Second Amended Complaint. (Doc. 9).

6. On or about October 7, 2021, this Honorable Court granted Defendant's Motion to Dismiss with leave to amend. (Doc. 16).

7. On or about October 20, 2021, Plaintiff filed a Second Amended Complaint. (Doc. 19).

8. Plaintiff's alleged two putative classes, the "ATDS Class," and the "DNC Class," should be dismissed as impermissible fail-safe classes.

9. Plaintiff's Second Amended Complaint fails to plead sufficient factual allegations to overcome the particularity requirements of Fed. R. Civ. P. 8(a)(2).

10. For all of the reasons set forth in the accompanying Memorandum of Law, which is incorporated herein by reference, Defendant hereby moves for an Order dismissing the class allegations in Plaintiff's Second Amended Complaint, with prejudice.

WHEREFORE, Defendant, Direct Building Supplies, LLC, requests this Honorable Court to dismiss Plaintiff's Second Amended Complaint, with prejudice, and strike the class allegations.

TUCKER ARENSBERG, P.C.

Dated: November 10, 2021

By /s/ Kevin L. Hall
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CERTIFICATE OF SERVICE

I, Kevin L. Hall, Esquire, of the law firm of Tucker Arensberg, P.C., hereby certify that I served a true and correct copy of the foregoing document this date through the Court's Electronic Case Filing (ECF) system on the individuals as follows:

Cynthia Z. Levin, Esquire
Todd M. Friedman, Esquire
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TUCKER ARENSBERG, P.C.

Dated: November 10, 2021

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